

NOT FOR PUBLICATION**UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE TENTH CIRCUIT**

IN RE SHIRLEY LEVINGSTON
THOMAS, also known as Shirley Ann
Thomas, also known as S. A. Thomas,

Debtor.

BAP No. WO-06-069

SHIRLEY LEVINGSTON THOMAS,

Appellant,

Bankr. No. 05-28131-NLJ
Chapter 13

v.

ORDER AND JUDGMENT*

JOHN T. HARDEMAN, INTERNAL
REVENUE SERVICE, OKLAHOMA
TAX COMMISSION, TEACHERS
CREDIT UNION, and CARL
MATHENIA, Personal Representative
of Emma J. Mathenia, Deceased,

Appellees.

Appeal from the United States Bankruptcy Court
for the Western District of Oklahoma

Before McFEELEY, Chief Judge, BROWN, and McNIFF, Bankruptcy Judges.

McNIFF, Bankruptcy Judge.

The parties did not request oral argument, and after examining the briefs and appellate record, the Court has determined unanimously that oral argument would not materially assist in the determination of this appeal. Fed. R. Bankr. P. 8012. The case is therefore ordered submitted without oral argument.

* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. 10th Cir. BAP L.R. 8018-6(a).

The Debtor, Shirley Levingston Thomas (“Debtor”), timely appeals the bankruptcy court’s December 14, 2005 Order Granting Relief from Stay and Granting Objection to Plan (“Stay Relief Order”), the January 27, 2006 Order Denying Confirmation and Dismissing Case (“Dismissal Order”), and the June 15, 2006 Order Regarding Debtor’s Combined Motion to Alter or Amend Orders Including the Order Denying Confirmation of Plan and Dismissing Case with Prejudice (“Order on Motion to Alter or Amend”) (collectively, the “Orders”). Finding no error, we affirm.

Jurisdiction and Standard of Review

The Debtor filed a timely Notice of Appeal of the Stay Relief Order, Dismissal Order and Order on Motion to Alter or Amend, and no party has elected to have the appeal heard by the United States District Court for the Western District of Oklahoma. Therefore, this Court has jurisdiction over the appeals of the Orders. 28 U.S.C. § 158(a)(1), (b)-(c); Fed. R. Bankr. P. 8001(a) & (e); Fed. R. Bankr. P. 8002(a); 10th Cir. BAP L.R. 8001-1.

A bankruptcy court’s order dismissing a Chapter 13 case is reviewed for abuse of discretion. *In re Armstrong*, 303 B.R. 213, 218 (10th Cir. BAP 2004). We also review an order lifting the automatic stay for abuse of discretion. *Pursifull v. Eakin*, 814 F.2d 1501, 1504 (10th Cir. 1987). Under the abuse of discretion standard, we will not disturb the decision unless the court has a definite and firm conviction that the lower court made a clear error of judgment or exceeded the bounds of permissible choice. *Moothart v. Bell*, 21 F.3d 1499, 1504 (10th Cir. 1994) (citation and quotation omitted).

Background

On May 16, 2005, the Debtor filed a Chapter 7 petition for relief in the United States Bankruptcy Court for the Western District of Oklahoma. In that case, the bankruptcy court granted relief from the automatic stay to Carl Mathenia (“Mathenia”), the personal representative of the probate estate of Emma J.

Mathenia. The stay relief order permitted Mathenia to continue probate proceedings pending in state court that would allegedly terminate whatever interest the Debtor had in a house located at 401 North Wisconsin Ave, Oklahoma City, Oklahoma (“Wisconsin Avenue Property”). The Debtor received her Chapter 7 discharge on September 6, 2005.

Acting *pro se*, the Debtor filed her Chapter 13 petition for relief in this bankruptcy case on October 14, 2005. The Debtor scheduled an ownership interest and a homestead exemption in the Wisconsin Avenue Property. At the time, the Debtor did not reside in the Wisconsin Avenue Property.

The Debtor also filed a Chapter 13 Plan (“Plan”). The Debtor’s schedules showed disposable income of \$767 per month, but she proposed a Chapter 13 plan payment of \$500 per month. The Debtor’s Plan Summary indicated the Debtor had no liabilities. However, the Plan provided for payment of a real estate tax claim “on the debtor’s intended principal place of residence” (the Wisconsin Avenue Property); proposed a 100% return to unsecured creditors; and stated the Debtor’s intention to initiate an adversary proceeding to determine the ownership of a 2002 Chevrolet Impala.

Several objections to the Plan were filed. The Oklahoma Tax Commission and the Internal Revenue Service both objected that the Debtor had failed to file required tax returns for several years. The Chapter 13 standing trustee, John Hardeman (“Trustee”), and the Teachers Credit Union also objected. The Trustee’s Objection contained a request for dismissal.

Meanwhile, on November 4, 2005, Mathenia filed a Motion for Relief from Stay (“Motion for Relief”) seeking the same relief he had been granted in the Chapter 7 case. The Debtor responded to the Motion for Relief, expressing her general dissatisfaction with the probate proceedings and arguing she owned the Wisconsin Avenue Property. The bankruptcy court held a hearing on the Motion for Relief. The Debtor appeared but declined to present any opposition or

argument. The bankruptcy court stated on the record that the proper forum to resolve the ownership of the residence and the probate issues was the probate court. On December 14, 2005, the bankruptcy court entered the Stay Relief Order. The Debtor filed a Motion for Rehearing on December 23, 2005.

On November 18, 2005, the bankruptcy court held a hearing on confirmation of the Plan and the motion to dismiss. At the hearing, the Debtor argued the Plan should be confirmed because she removed several pending lawsuits to the bankruptcy court. On the record, the bankruptcy court found that the Debtor had failed to include certain secured claims in her Plan, had not filed tax returns for several years, had failed to provide information to the Trustee as requested, had not resolved the disposable income discrepancy, and had taken no steps to correct the problems despite notice. The bankruptcy court denied confirmation of the Plan and dismissed the Chapter 13 case with prejudice. The formal Dismissal Order, entered January 27, 2006, precluded the Debtor from refile for a period of 180 days from the date of the order.

The Debtor timely filed a Combined Motion to Alter or Amend the Dismissal Order. On June 15, 2006, the bankruptcy court entered its Order on Motion to Alter or Amend and addressed the Motion for Rehearing in the Order as well. The bankruptcy court denied the motions, concluding the dismissal with prejudice was proper because of the Debtor's history of four prior bankruptcy cases; finding the Debtor's challenge to the Stay Relief Order meritless; and stating that its findings on the record constituted cause to dismiss. This timely appeal followed.

Discussion

The Debtor contends the bankruptcy court deprived her of procedural and substantive due process because the Dismissal Order and Order on Motion to Alter or Amend did not contain findings and conclusions, despite the Debtor's request for findings. However, the Debtor offered no authority for the argument

in this Court. Furthermore, the argument lacks a factual basis. The bankruptcy court made findings on the record at the confirmation hearing and incorporated those findings and conclusions in the Dismissal Order.

The Debtor also argues the Plan was proposed in good faith and, therefore, her Chapter 13 case should not have been dismissed. Under 11 U.S.C. § 1307(c) & (c)(5), the court may dismiss a Chapter 13 case for cause and/or for the denial of confirmation and of a request made for additional time to file another plan. Cause to dismiss a Chapter 13 case includes a lack of feasibility, the failure to include claims in the plan, unwillingness to propose a confirmable plan, discrimination among creditors, delay and the failure to file tax returns. *In re Pruitt*, 203 B.R. 745, 746 (Bankr. N.D. Okla. 1996).

In this case, the Debtor's Chapter 13 Plan was not confirmable on its face, and the Debtor offered nothing to suggest she was willing or able to correct the problems with the Plan. Instead, she argued with the bankruptcy court about whether or not removing state court actions to the bankruptcy court made her Plan confirmable. The bankruptcy court did not err in finding that the Plan was not confirmable.

Nor was it an abuse of discretion for the bankruptcy court to dismiss the Debtor's fifth bankruptcy case with prejudice to filing for 180 days. The Debtor is a serial filer who proposed an unconfirmable Plan in her most recent case. She failed to request any additional time to amend the Plan, to file tax returns, or to address the problems with the Plan.

Despite the lack of findings and conclusions in the Stay Relief Order, the Court will not consider the Debtor's appeal because the dismissal of the Chapter 13 case, affirmed here, renders the appeal of the Stay Relief Order moot. *In re Gdowik*, 228 B.R. 481, 482-83 (S.D. Fla. 1997); *In re Sharon*, 234 B.R. 676, 679 n.1 (6th Cir. BAP 1999). Under 11 U.S.C. § 362(c)(2)(B), the automatic stay expires upon dismissal of the case.

Conclusion

The bankruptcy court did not abuse its discretion. The Orders are
AFFIRMED.